

IN THE
Supreme Court of the United States

—
No. 1157
—

STANDARD SURETY AND CASUALTY COMPANY OF NEW YORK,
Petitioner,

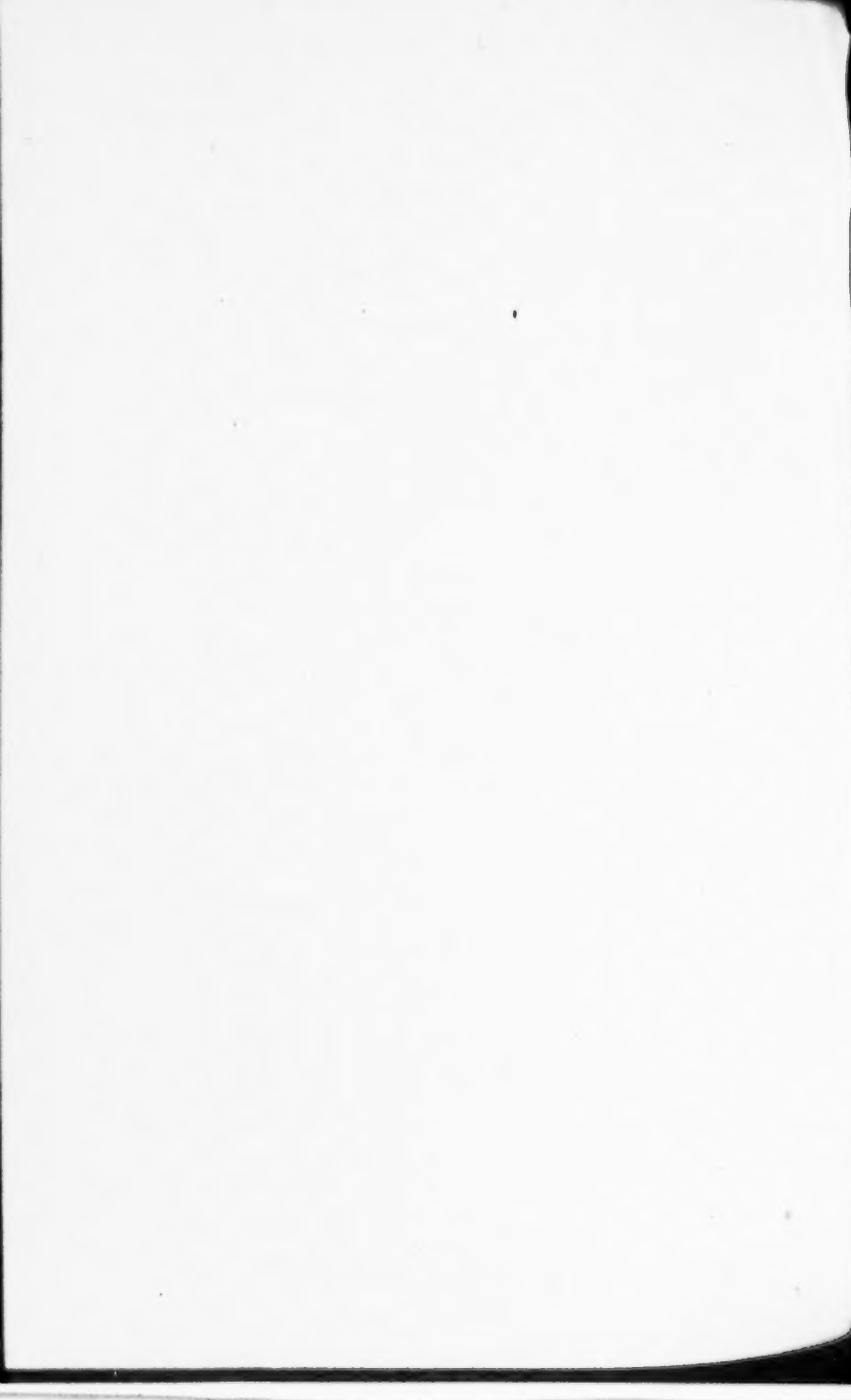
v.

THE PLANTSVILLE NATIONAL BANK and THE FEDERAL DEPOSIT
INSURANCE CORPORATION, *Receiver, Respondents.*

—
**PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE SECOND CIRCUIT AND BRIEF IN SUP-
PORT THEREOF.**

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**PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE SECOND CIRCUIT.**

*To the Honorable Chief Justice and the Associate Justices
of the Supreme Court of the United States:*

Standard Surety and Casualty Company of New York, petitioner, prays that a writ of certiorari issue to review the judgment of the United States Circuit Court of Appeals for the Second Circuit, decided December 4, 1946, rehearing denied December 27, 1946. The second circuit affirmed the judgment of the United States District Court for the District of Connecticut entered on December 6, 1945, finding against the petitioner in an action against the Plantsville (Connecticut) National Bank and The Federal Deposit Insurance Corporation.

The instant cause of action, which sounds in deceit, proceeded from a misrepresentation of the cashier of the defendant bank in repeated communications to the petitioner that the Van Dyke Construction Company, which was an applicant for construction bonds, had on deposit in said bank the amount of \$53,455.60 and also had a line of credit in the sum of \$150,000. Relying upon these assurances the petitioner surety company proceeded to write performance bonds for the Van Dyke Construction Company which defaulted in the construction projects involved. Then it was ascertained that the construction company had with the defendant bank no deposit whatever or no line of credit and that the cashier who had made these misrepresentations was a heavy stockholder in said construction company. Whereupon this cause of action was instituted.

Opinions Below.

There is no reported opinion of the trial court. However, its findings and conclusions appear in the record pp. 32-40. The opinion of the United States Circuit Court of Appeals for the Second Circuit (R. 134) appears in 158 Fed. (2) 422 (Advance sheets). The denial of petition for rehearing (R. 149) was unaccompanied by an opinion.

Jurisdiction.

The jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code as amended by the Act of February 13, 1925. (28 U. S. C. A. 347.)

Question Presented.

Whether a surety company in formally seeking information from a national bank as to the financial standing of a construction company applying for bonds on municipal projects is entitled to damages as against the bank when it appears that the cashier thereof, in pursuance of his own dishonest designs, represented to the surety that the con-

struction company had on deposit in that institution \$53,-455.60 and also possessed a line of credit of \$150,000.00, when ultimately it was revealed that the construction company had neither a deposit nor a credit, and the surety company incurred considerable losses as a result of writing bonds in reliance on these representations.

Statement of Facts.

This is a suit by the Standard Surety and Casualty Company of New York to recover damages sustained as a result of the fraudulent misrepresentation of the cashier of the Plantsville (Connecticut) National Bank of the status of the account and credit of the Van Dyke Construction Company, for which the plaintiff had been requested to write certain performance bonds. The defense offered no testimony and relied chiefly on the contention that the misrepresentations were neither authorized by the defendant bank nor relied upon by the plaintiff. (R. 33) Every fact in the case was found in favor of the plaintiff by the Trial Court. (R. 33 et seq.) However, the Court below concluded as a matter of law that the damages proved could not be attributed to the misrepresentations on which the plaintiff company relied. (R. 39-40)

The Standard Surety and Casualty Company of New York is a corporation with its principal place of business at the time in question in the city of New York. (R. 1) The Plantsville National Bank of Plantsville, Connecticut, is in receivership, and the Federal Deposit Insurance Corporation is the receiver. (R. 2)

Standard is engaged in the business of writing surety bonds. (R. 2) At the time of the transactions here involved, the Van Dyke Construction Company, incorporated under the laws of the State of New Jersey, was engaged in the business of a construction contractor. (R. 2)

In the fall of 1938 Van Dyke requested Standard to execute certain surety bonds, guaranteeing the performance of certain construction contracts and the payment of bills

for labor and materials incurred in the performance of these contracts. (R. 2)

At the time that Van Dyke made application for bonds, it delivered to Standard a statement purporting to set forth the assets, liabilities, and financial standing of Van Dyke, which indicated, among other things, that it had on deposit at the Plantsville National Bank a cash balance of \$53,455.60. (R. 7)

At the same time Van Dyke delivered to Standard a letter on the stationery of the Plantsville National Bank signed by E. L. Sullivan, cashier, dated August 23, 1938, which stated that Van Dyke had a balance on that date of \$53,455.60 and had been granted a line of credit in the amount of \$150,000 by said bank. (R. 8) E. L. Sullivan on that date was the cashier of the Plantsville National Bank, and the signature on the letter is genuine. The same E. L. Sullivan was a stockholder of the Van Dyke Construction Company holding 530 shares of preferred stock out of 600 authorized. (R. 34) His ownership of common stock, if any, is unknown.

On November 2, 1938, Standard sent a letter addressed to the Plantsville National Bank requesting a confirmation of the \$53,455.60 balance and stating that it had been asked to execute certain contract bonds. Receiving no reply to this letter Standard renewed its request in another letter addressed to the Plantsville National Bank on November 15, 1938. (R. 8)

All communications on the part of Standard with the bank were addressed to the bank as an institution and not to any particular individual. (R. 8-9)

In reply to the second letter Standard received a telegram confirming the balance and stating that a letter would follow. (R. 11) The telegram was signed Plantsville National Bank and was sent on November 16, 1938, from Plantsville, Connecticut. Subsequently, Standard received a letter on the stationery of the Plantsville National Bank dated November 17, 1938, signed "M. L. Ensle, assistant

cashier" stating that Van Dyke had carried "a substantial account" for the "past two months," maintaining a balance of approximately \$53,455. (R. 11) The signature of M. L. Ensle on this letter of November 17 was in fact a forgery. The trial court found that said forgery was perpetrated by E. L. Sullivan. (R. 34)

As a matter of fact, Van Dyke did not have a balance at the Plantsville National Bank as represented, and, in fact, had no account whatsoever and did not possess a line of credit from that institution in any amount. (R. 36)

Under date of December 23, 1938, Standard executed for Van Dyke a performance bond in the sum of \$115,644 on a municipal project in the Borough of Seaside Park, New Jersey. (R. 47) Under date of January 24, 1939, Standard executed for Van Dyke a performance bond in the sum of \$85,500 on a municipal project in Claremont, New Hampshire. (R. 48)

In determining to execute these bonds, the officers of Standard, and particularly the underwriting committee thereof, relied primarily on the letters and the telegram of the bank as to the amount of moneys on deposit. (R. 38-39) Standard also considered the Dun & Bradstreet report indicating that this was a newly established company (R. 77); also statements of Van Dyke as to its financial standing included in the application for bonds (R. 43); and also certain experience statements as to the officers of Van Dyke submitted by John T. Ostheimer, a broker. (R. 79) Van Dyke was not incorporated until September 1, 1938, and the officers of Standard were aware of that fact when it executed the bonds in question. (R. 38-39)

Howard G. Riley of the underwriting committee of Standard informed himself from Rand & McNally's Bankers' Guide that the capital and unimpaired surplus of the Plantsville Bank amounted to \$58,000. (R. 35) He was aware of the fact that the amount of credit which the National Bank lawfully could extend to a single customer was one-tenth of its unimpaired capital and surplus, and assumed

that a national bank in such circumstances could get other banks to cooperate in extending a line of credit in excess of that allowed to that single bank.

There was nothing in the papers examined by Mr. Riley that aroused any suspicion on his part since he relied on the statements purporting to have been forwarded by a national bank. (R. 35)

Walter Makosky, chairman of the underwriting committee, testified in his deposition (R. 70) that no bonds would have been written for Van Dyke had it not been for the reliance of Standard on the representation of the bank as to the amount of money on deposit.

Van Dyke thereafter defaulted in the performance of the construction contracts both at Seaside Park and at Claremont, New Hampshire. It failed to pay certain obligations for work, labor, services, and the materials. (R. 36)

Standard in accordance with its bond took over the Seaside contract in June, 1939, and completed the performance, satisfying the claims of that municipality for damages for failure of Van Dyke to complete its contract and paying outstanding obligations incurred by Van Dyke. (R. 36) Standard did not perform any of the physical work of completion, but let a contract therefor, first to the Titan Construction Corporation, which defaulted, and then to the Thomas Proctor Company, Inc. Standard's net loss incurred in connection with the Seaside contract was \$37,798.43 of which \$6,827.41 represented lawyers' fees.

Standard in accordance with its bond completed the Claremont contract, satisfied the claim of that municipality for damages for failure of Van Dyke to complete its contract and paid certain obligations incurred by Van Dyke. (R. 36) Standard did not perform any of the physical work of completion, but let a contract therefor to Kuchar Brothers, Inc. Standard's net loss incurred in connection with the completion of the Claremont contract was \$21,597.13 of which \$1,882.45 was on account of lawyers' fees.

At the time the performance bonds were executed by

Standard, Van Dyke had executed an indemnity agreement to indemnify Standard against any and all loss, liability, costs, damages, attorneys' fees, and expenses of any kind whatsoever sustained in consequence of executing these bonds. (R. 36)

At the pretrial hearing it was admitted by the defendants that the plaintiff was called upon and was obligated to finish both these projects under the performance bonds which had been written. (R. 31)

Some time after these bonds were written, Standard sought to have Van Dyke transfer its Plantsville deposit to a New York bank. Failure of Van Dyke to comply with this request resulted in Standard declining further bonds, particularly on a project at Tarrytown, New York. (R. 116-117)

After the default of Van Dyke, the Federal Deposit Insurance Corporation, with the vast investigative facilities of the federal government at its command, sought to ascertain the subsequent history of the construction company. In the fourth paragraph of the Answer to Plaintiff's Pre-trial Interrogatories, the Federal Deposit Insurance Corporation states (R. 27-28):

"FOURTH: Interrogatories numbered respectively 5, 6, 7, and 9 cannot be answered by this defendant for the following reasons: They relate to transactions and matters had between the plaintiff and the Van Dyke Construction Company concerning which this defendant has no knowledge, and concerning which it cannot, with reasonable diligence, obtain information, except from the plaintiffs in this action, who are in possession of all the documents. Defendant caused an investigation to be made of the affairs of the Van Dyke Construction Company and attempted to secure its books and papers. As a result of such investigation, it was informed by the Secretary of State of the State of New Jersey that the charter of said construction company had been revoked for non-payment of taxes; it attempted to communicate with the registered agent of the said Construction Company and was unable to find

his address or to obtain any of the books and papers of the said Construction Company."

Since the complaint (R. 1) is silent as to any recovery made by Standard from the construction company under the indemnity agreement, it reasonably may be inferred that none was had. Had the surety company been able to recoup any of its losses from Van Dyke, it would have been required as a matter of good faith to so state in the complaint.

Reasons for Granting the Writ.

1. *In holding that the misrepresentations of a cashier of a national bank, made for his own dishonest purposes, as to the existence of a fictitious deposit of \$53,455.60 plus a fictitious line of credit of \$150,000 on which a surety company relied to its own detriment does not make the bank accountable is in derogation of the meaning of this court in Gleason v. Seaboard Air Line Railway, 278 U. S. 349.*

2. *The holdings of the trial and appellate courts constitute such a departure from the accepted and usual course of judicial proceedings as to warrant review by this Court.*

3. *The Circuit Court of Appeals has decided an important question of law affecting the national banking structure in a way that would appear to ignore an applicable decision of this Court. (Gleason v. Seaboard Air Line Railway, 278 U. S. 349)*

4. *The question involved is one of gravity and importance, both as to the national banking system and the business of suretyship in the United States.*

5. *The holding of the Circuit Court of Appeals for the Second Circuit is so at variance with accepted law on the subject as to require settlement by this Court. For instance, the Restatement of Law of Torts, Section 546, expresses the view that one is liable for pecuniary loss caused*

another if the other's "justifiable reliance upon the misrepresentations is a substantial factor in determining the course of conduct which results in his loss."

6. Since public construction of any kind rarely is undertaken without bid and performance bonds, it would seem that the relative rights and responsibilities of national banks, to which the surety companies must largely look in determining whether risks safely may be underwritten, should be passed upon and settled by this Honorable Court.

Prayer for Writ.

Wherefore, your petitioner prays for writ of certiorari to be issued under the seal of this Court directed to the United States Circuit Court of Appeals for the Second Circuit commanding that Court to certify and send to this Court a complete transcript of the record and all proceedings in the instant cause so that this cause may be reviewed and determined by this Court, and so that the judgment of the United States Circuit Court of Appeals for the Second Circuit may be reversed and that the petitioner may be granted such other and further relief as may seem proper.

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BRIEF IN SUPPORT OF PETITION FOR CERTIORARI.

Summary of Argument.

1. *Certiorari should issue to correct the judgment of the Second Circuit Court of Appeals in a case involving the rights and responsibilities of national banks.*

2. *Certiorari should issue to correct the judgment of the Second Circuit Court of Appeals wherein it appears that the court's action constitutes a radical departure from the accepted and usual course of judicial proceedings.*

3. *Certiorari should issue to correct the judgment of the Second Circuit Court of Appeals wherein that court appears to have ignored an applicable decision of this Honorable Court.*

4. *Certiorari should issue since the question involved is one of gravity and importance both as to the national banking system and the business of suretyship in the United States.*

Argument.

The outstanding reason for the issuance of a writ of certiorari resides in the fact that the Circuit Court of Appeals in a national banking case appears to have violated the principles enunciated by this Honorable Court in *Gleason v. Seaboard Air Line Railway Company*, 278 U. S. 349; 73 Law Ed. 415.

Because of its significance insofar as the rights and responsibilities of the national banking system and the surety business are concerned, it would seem that this case presents a worthy claim for the exercise of this court's discretion in the issuance of the writ.

In the Gleason case a railroad Company was held liable for the loss of \$10,000 incurred by a consignee who paid a draft upon reliance on the false assurance of the railroad agent that a consignment of cotton had arrived, even though the misrepresentation was made in furtherance of a scheme of the agent to enrich himself by resort to this device.

In the case at bar a surety company was induced to write bid and performance bonds in reliance upon the assurances of a dishonest cashier of a national bank that a certain construction company had on deposit the sum of \$53,455.60 and a line of credit in the sum of \$150,000.

It would appear to counsel for the petitioner that the cases are strictly analogous. In the Gleason case the misrepresentation related to the asserted arrival of a consignment of cotton. In the case at bar the misrepresentation related to a bank deposit and a line of credit. The Second Circuit Court of Appeals was aware of the Gleason case, but instead of adhering to the principles stated therein proceeded to stray into the fields of conjecture.

Counsel are aware that a petition for certiorari properly should not invite the attention of this court to consideration

of the case on the merits. However, there are certain features of the trial which should be regarded in the matter of determining whether the writ should issue. While the appellate court concurred in the conclusion of the trial court, there is a marked variance in the reasons adduced by the respective courts. The trial court appears to have arrived at its disposition of the case upon the theory that the misrepresentation as to the deposit and the line of credit was not the proximate cause of petitioner's loss (R. 39-40). The appellate court holds that the attribution of petitioner's losses "to the absence of the deposit in the defendant bank rests upon too slender a foundation to justify the imposition of any liability" (R. 140).

Incidentally, the existence or non-existence of the deposit is not the controlling factor. The real issue is whether there was a misrepresentation on the part of the defendant bank on which petitioner relied to its detriment.

The misrepresentations of the bank on which the surety company relied, as found by the Trial Court, induced the surety company to take a position where losses were almost inevitable. Had not the surety company been induced by reason of these misrepresentations to assume liability in the premises, there would have been no occasion for this suit.

The conclusion of the trial court as to lack of proximate cause was not suggested at the pretrial hearing, was not discussed or considered at the trial itself, and was not the subject of argument on the part of counsel for defendants. Indeed, the motion for a bill of particulars—which was addressed almost entirely to a disclosure of the specific items that made up the damages suffered, is hardly consistent with the theory of the trial court that there was no connection between the misrepresentations and the losses.

At the pretrial hearing, which supposedly was held with a view to framing the issues involved, there was nothing mentioned in support of the conclusion arrived at by the trial court after the trial itself had been had.

At the trial of the case there was so little question as to the element of proximate cause that the court permitted the plaintiff to reopen his case in order to prove more specifically certain of the items making up the losses suffered by the surety company.

The theory of the trial court that some factor other than the misrepresentations may have been attributable for the losses incurred finds no support anywhere in the record. Had there been some factor other than the misrepresentations responsible for the losses, then it is respectfully suggested that this should have been established by the defendants in this case as an element of their defense. However, the defendants offered no testimony whatever.

In the fourth paragraph of the answer of the Federal Deposit Insurance Company to the plaintiff's pretrial interrogatories the suggestion appears that the surety company was in possession of documents and other proof which would shed light on the transactions had with the Van Dyke Construction Company. Now it happens that the company in this action charged that the damages proceeded from the misrepresentations of the bank. Were it true that there was in the possession of the surety company any information or proof disclosing that factors other than the bank's misrepresentation were responsible for the losses incurred, then it appears strange that counsel for defendants did not invoke the authority contained in the New Rules of Civil Procedure, with a view of eliciting such proof and compelling the production of such documents.

To hold that the misrepresentations were not responsible for the losses is akin to the argument that one, having placed a helpless infant on a highway, is not answerable in damages for the child's injuries because he had nothing to do with the operation of the vehicle that ran down the child.

Having found every fact in the case in the plaintiff's favor, the duty of the trial court in the premises was plain. It should have awarded damages on the basis of the proof

adduced by the plaintiff. The Court was not free at that stage to indulge in capricious conjecture as to some other factor or factors which might have caused the losses.

Had the Court submitted to a jury the issues of fact herein involved and had the jury found as the Court itself found in this case on the facts in favor of the plaintiff, the duty of the Court plainly would have been to award the damages proved.

It is not suggested that the Court may not decide a case on a theory that has not been suggested by counsel on either side or presented by the pleadings and the proof. However, at pretrial hearing, with the Court having before it the pleadings, the interrogatories, and the answers thereto, it would have been far better had the Court at that time confided in counsel to the extent of apprising them of the theory on which later he was to determine the entire case. And, at the trial of the case itself, the presentation and the reception of proof and the absence of any factual defense hardly presented any basis for deciding this case on the theory adopted by the trial court.

Counsel for the appellant insists there is a clear, clean connection between the misrepresentations on which the surety company relied and the losses thereafter suffered. There is no room for surmise as to other factors which might have brought about the losses. The trial court, after all the proof was in, went off on an excursion into the realm of conjecture and then emerged with this conclusion of law which appellant insists is clearly wrong, both as a matter of law and as a matter of ordinary reason.

Review of all the facts leads inescapably to the inevitable conclusion that but for the misrepresentations of the bank, no liability would have been incurred and no loss sustained. In such circumstances, the losses of the surety company definitely are chargeable to the bank.

There is no mystery as to the reasons that caused the construction company to default on these projects. The answer is simple. The company simply lacked funds to

undertake such work. Examination of the application for a line of credit filed with the surety company by Van Dyke lists as assets (R. 44-45) cash deposited in Plantsville National Bank, \$52,190; cash deposited in Irving Trust Company of New York City, \$1,698; cash in the office, \$50. On the other hand, there are listed as liabilities, a note payable to the Plantsville National Bank in the sum of \$3,500 and a bond premium due John T. Ostheimer of \$455.16. Examination of these figures would indicate that with the Plantsville deposit eliminated as a fiction, the company owed \$3,955.16 when its only cash was that in the Irving Trust Company amounting to \$1,698. Obviously, the company was insolvent when it started business. Instead of the reasons for the construction company's collapse being veiled in mystery, they are abundantly clear.

The construction company was embarking on two projects totalling \$200,000; yet, it was insolvent. In this connection, it is of interest to note the statement of Makosky of the underwriting committee that in his view a contractor, in order to provide a good risk, should have 20 per cent of the total cost at hand in cash. (R. 71) Riley of the underwriting committee of the surety company testified that in his view a figure of 10 per cent of the total cost would be necessary in order to provide a desirable risk. (R. 96) It was just impossible that a construction company in the dire financial straits of Van Dyke ever could have been expected to avoid default on these projects.

The Trial Court in its conclusions states:

“Here it is plain enough that at least one proximate cause of plaintiff's loss was Van Dyke's failure.”

Then the Court proceeds to speculate as to the possibility of other factors being responsible.

Curiously enough, the Trial Court reasons:

“Even if Van Dyke had had cash and credit in November, it does not follow, and neither the bank nor its agent ever represented that the cash and credit

would be available some seven months later for the plaintiff's indemnification."

However, the fact is that there was neither a Plantsville cash balance nor line of credit.

Having found all facts in the case at bar in favor of the plaintiff surety company, it was the duty of the Trial Court to apply the Connecticut rule as set forth in *Winsted Hosiery Co. v. New Britain Knitting Co.*, 69 Conn. 565:

" * * * in cases tried to the jury the judge is now authorized, and policy requires, to find the facts adjudicated by him in reaching his ultimate conclusion, including all specific facts which, when so adjudicated, must determine the nature of the ultimate conclusion and subordinate conclusions involved therein, by force of settled rules and principles of law. (Emphasis supplied.) The judgment rendered in such an adjudication of facts is merely the voice of the law declaring the legal effect of the facts adjudicated."

The conclusion of the Trial Court would appear to be violative of the recent admonition of the United States Supreme Court in *Commissioner of Internal Revenue, Petitioner v. Scottish American Investment Company, Ltd.*, 323 U. S. 119; 89 Law Ed. 113:

"The judicial eye must not in the first instance rove about searching for evidence to support other conflicting inferences and conclusions which the judges or the litigants may consider more reasonable or desirable * * * . Moreover, this exemplifies one type of factual dispute where judicial abstinence should be pronounced."

The correct general rule, which the Court apparently ignored, is contained in the Restatement of Torts, Section 546:

"The maker of fraudulent misrepresentation in a business transaction is liable for pecuniary loss caused to its recipient by his reliance upon the truth of the matter misrepresented if his justifiable reliance upon

the misrepresentations is a substantial factor in determining the course of conduct which results in his loss." (Emphasis supplied)

Finally, a surety bond is a guarantee that a project will be completed and payment made for labor and materials. It is only reasonable to assume that the surety company would not have incurred this liability if it had not relied fully upon the representations of the national bank. It certainly never would have bonded an insolvent contractor. Having assumed that liability and having suffered losses thereby, it appears plain that the defendants are responsible in damages for the losses incurred.

Conclusion.

On the basis of the foregoing it is respectfully submitted that the writ of certiorari should issue.

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